IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 205

GLOBE LIQUOR COMPANY, INC., A Corporation,
Petitioner,

vs.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN,
Doing Business Under the Firm Name and Style of International Industries,
Respondents.

ADDITIONAL BRIEF FOR RESPONDENTS.

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May It Please the Court:

The case involves questions of law only. In the various sections of our argument, we discuss the undisputed facts that were admitted in evidence by the trial judge, and also other proof that is preserved in the record that was not admitted in evidence during the trial. All of this excluded proof was offered by the respondents and was excluded by the trial judge on motion of the petitioner. All of the proof offered by the petitioner was admitted in evidence by the trial judge.

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2.

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3.

The form and substance of the respondents' motion for a new trial was substantially the same as a motion for judgment notwithstanding the verdict.

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4.

No part of Todes' deposition was properly admitted in evidence. The record is clear that the entire Todes deposition was excluded by the trial court.

5.

The history, purposes and wording of Rule 50(b) of the Federal Rules of Civil Procedure establish beyond all doubt that the rule does not apply to a directed verdict where the court grants a motion for a directed verdict without submitting the case to the jury for its independent determination of the facts.

6.

The final order entered by the Circuit Court of Appeals in the instant suit for judgment in behalf of the respondents is not in conflict with the decision of this court in the case of *Cone* v. *West Virginia Pulp & Paper Co.*

7.

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Had the petitioner accepted the shipper's offer to recondition the goods, the bargain of the parties would have been fully performed and no one would have been damaged.

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17.

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ARGUMENT.

1.

INTRODUCTION.

We are taking the liberty of assuming that the prime question for decision in this Court is the procedural question as to whether Rule 50(b) of the Federal Rules of Civil Procedure applies to the instant suit where the trial court entered judgment on its instructed verdict without submitting the case to the jury for its independent, voluntary consideration and verdict. We are, therefore, discussing this procedural problem first, and later we comment on the facts and the propositions of law pertaining to this case raised by the petitioner's briefs.

We will demonstrate shortly that the Circuit Court of Appeals was entirely correct in holding in its opinion on the petition for rehearing by the petitioners, *that no part of the deposition of Todes, the salesman for the respondents, was ever admitted in evidence* (Rec. 258), *because it was excluded by the petitioner.*

The most important admission made by the petitioner is at page 8 of its additional brief, that there was "*no conflicting evidence* or evidence sufficient to support a verdict for the International." (Italics ours.) Thus the petitioner admits that the case at bar presented no controverted questions of fact, and that questions of law only were involved in the instant suit.

(For convenience, we will hereinafter designate the name of the respondents as "San Roman," which is the

appellation we used in our brief in opposition to the petition for certiorari.)

The Circuit Court of Appeals in its original opinion (Rec. 231), and in its opinion on the petition for rehearing (Rec. 257), pointed out that the plaintiff's complaint relied solely on a breach of an express warranty of quality and that the petitioner's proof did not contain,

> "one word or syllable in the written exhibits or in the oral testimony that the defendants ever agreed to deliver tequila 'in good merchantable condition, fit for human consumption.' In this state of total failure to prove an express warranty as alleged in the complaint, the court directed a verdict for the plaintiff. This was error." (Rec. 231)

In its opinion on the petition for rehearing, the Circuit Court of Appeals discussed the afterthought by the petitioner that it could recover on an implied warranty. This point was never raised by the petitioner in the trial court. The Circuit Court of Appeals, in its opinion on the petition for rehearing, in commenting on this contention of implied warranty, correctly stated:

> "No such view was taken in the briefs or in the argument. After the argument the plaintiff filed what it termed a supplemental memorandum in which (Rec. 257) it seemed to take this position for the first time."

In attempting to support its contention of an implied warranty, the petitioner cited parts of the deposition of Todes. The Circuit Court of Appeals correctly held that no part of the deposition of Todes was admitted in evidence by the trial court. In commenting on this maneuver of the petitioner, the Circuit Court of Appeals stated in its opinion on the petition for rehearing:

> "The trouble with this evidence is that it is not in the record and was kept out on the objection of the plaintiff. No part of the deposition was ever read or considered as read in evidence. No part of the dep-

> osition was ever admitted. There was some colloquy in the judge's chambers about the deposition, but nothing was ever done in open court about it. The Plaintiff makes the extraordinary suggestion to us that we consider the pleadings amended so as to declare on an implied warranty to conform to the evidence contained in a deposition excluded from the evidence on the objection of the plaintiff. The plaintiff will not be heard to claim the benefit of that evidence which it had had excluded. The plaintiff cannot be allowed to blow hot and cold after such a fashion. So there is in this record no evidence to support an implied warranty. There is a complete failure of proof either of an express or an implied warranty." (Rec. 258)

Questions of law only were involved in the instant suit as there were no disputed facts. The Circuit Court of Appeals had ample power to make a final disposition of the case on appeal in favor of the respondents. The grounds of the motion for a directed verdict in behalf of the respondents were fully and adequately stated and presented to the trial court not once, but repeatedly, and the respondents fully and substantially complied with that portion of Rule 50(a) of the Federal Rules of Civil Procedure which require that a motion for a directed verdict shall state the specific grounds therefor. Throughout the trial of the case in the trial court, the respondents kept insisting that they expressly refused to give any warranty concerning the goods. *The respondents kept insisting during the entire course of the trial that, because of their status as agents for the shipper in Mexico, and the further fact that the respondents did not see, handle or import the goods, and that they were not in the liquor business, they would not give any warranty concerning the goods.*

The petitioner was amply warned of the respondents' defense that they refused to warrant the goods. This repeated defense was contained in the respondents' opening

statement (Rec. 55, lines 19 to 26), their amended answer (Rec. 12, lines 20 to 24), their argument in support of their oral motion for a directed verdict at the conclusion of the petitioner's proof (Rec. 126, last 5 lines; Rec. 127, lines 1 to 8), the respondents' argument on the petitioner's motion to exclude the Todes deposition (Rec. 152, lines 29 to 37; Rec. 153, lines 1 to 4; Rec. 154, lines 21 to 24), the respondents' argument at the conclusion of all of the evidence when each of the parties made a motion for a directed verdict (Rec. 175, lines 13 to 17), and the defendants' motion for a new trial (Rec. 206, par. A). Although the precise words "disclaimer of warranty" or "refusal to warrant" were not used in presenting this defense; the language that was used was equivalent thereto, namely, that when the original order for the goods was given by the petitioner, it agreed with Todes, the salesman for the respondents, that the respondents "not being in the liquor business nor having an importer's license, and not handling said merchandise in any manner, were not to be personally liable for the shipment of liquor or its quality; * * *" (Resp. Am'd Ans., Rec. 12.)

Since plaintiff relied solely on an express warranty of quality, in view of the defendants' repeated defense that no warranty was given, the petitioner then had the burden or duty of proving, if it could, the existence of this alleged warranty. It failed completely as to this vital factor. The Circuit Court of Appeals was therefore correct in disposing of the case because of this failure by the petitioner to prove the existence of any alleged warranty by the respondents.

2.

Respondents' motion for a new trial empowered the Circuit Court of Appeals to make final disposition of the case.

Assuming, without conceding that Rule 50(b) of the Federal Rules of Civil Procedure applied to the case at bar, Respondents' motion for a new trial gave the trial court "a last chance to correct his own errors without the delay, expense or other hardships of an appeal."

We touched on this point at pages 40-43 of our original brief in opposition to the petition for certiorari.

The case of *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, is relied on heavily by the petitioner in support of its contention that the Circuit Court of Appeals did not have the power to make a final disposition of the case, because the respondents did not make a motion for judgment notwithstanding the verdict under Rule 50(b) of the Federal Rules of Civil Procedure.

In the *Cone* case, this court stated at page 216 of its decision, that the trial judge must be given an opportunity to exercise his judgment notwithstanding the vering a new trial or a judgment notwithstanding the verdict, and the trial judge is thus afforded "a last chance to correct his own errors without the delay, expense or other hardships of an appeal." See *Greer* v. *Carpenter*, 323 Mo. 878, 882, 19 S. W. 2d 1046, 1047."

It appears from the language used in Rule 50(b) that the trial court is given a last chance to correct his own errors by *either* a motion for a new trial or a motion for judgment notwithstanding the verdict. The very case cited by Your Honors in this last quotation, namely, *Greer* v. *Carpenter*, 323 Mo., 878, 882, 19 S. W. 2d 1046, 1047, points out that the functions of a motion for a new trial

and of a motion for judgment notwithstanding the verdict, are one and the same in so far as giving the trial court a last chance to correct his own errors without the delay, expense or other hardships of an appeal. In *Greer* v. *Carpenter*, the concluding paragraph of that opinion by the Supreme Court of Missouri states:

> "In *Maplegreen Co.* v. *Trust Co.*, 237 Mo. 350, loc. cit. 362, 141 S. W. 621, 624, we said: 'The office of a *motion for a new trial* is to gather together those rulings complained of as erroneous, and solemnly and formally present them, one by one, in black and white *to the judge, in order that he have a last chance to correct his own errors without delay, expense, or other hardships of an appeal.* This, on the theory that even a judge is entitled to a last chance—a *locus poenitentiae.*'" (Italics ours.)

This function of a new trial is a well settled principle of procedure and we may paraphrase it as another kind of "last chance" doctrine, and has been followed in many cases which include these authorities: *Fruit Supply Co.* v. *Chicago, B. & Q. R. Co.*, 119 S. W. (2d) 1010, 1011; *Bass* v. *Baltimore & Ohio Terminal R. Co.*, 145 Fed. (2d) 779, 781; *Saginaw Broadcasting Co.* v. *Federal Communication Commission*, 96 Fed. (2d) 554, 558; *Phelan* v. *Carey*, 23 N. W. (2d) 10, 12; *Fitzgerald* v. *Lane*, 126 S. W. (2d) 65, 70; *Koboski* v. *Cobb*, 297 Pac. 771, 772; *State* v. *Haid*, 38 S. W. (2d) 44, 51; *Utz* v. *Dormann*, 39 S. W. (2d) 1053.

The defendants' motion for a new trial (Rec. 204, 206) squarely called to the trial court's attention this paramount question of the absence of any warranty by the respondents because of their refusal to give any warranty concerning the goods (Rec. 206, par. (A)). This was a pointed reminder to the trial judge as to this important warranty factor and it was ignored by the trial judge.

In the motion for a new trial the respondents enumerated various issues as being "contested questions of

fact." However, the petitioner admitted at page 8 of its additional brief that there was no conflicting evidence in the instant suit. Therefore, it is plainly evident that this characterization in the motion for a new trial of contested questions of fact was a last-straw effort by the respondents to salvage at least a new trial from the trial judge. The trial judge ruled against the respondents on practically every ruling that he made during the course of the trial, and he then granted the petitioner's motion for a directed verdict without submiting the case to the jury. Although in the *Cone* case the respondents made a motion for a new trial, it was restricted to the ground of newly discovered evidence. In the case at bar, the respondents' motion for a new trial was comprehensive and stressed the refusal of the respondents to warrant the goods.

Thus, by the respondents' motion for a new trial, the trial court was given ample and complete warning of the plaintiff's failure to prove its complaint which was predicated on an alleged breach of an express warranty that was not proved, and the trial court was given a last chance to correct "his own errors without the delay, expense or other hardships of an appeal."

3.

The form and substance of the Respondents' motion for a new trial was substantially the same as a motion for judgment notwithstanding the verdict.

Had the respondents made a motion for judgment notwithstanding the verdict in the trial court under Rule 50(b), it would have to follow under the *Cone* decision that the Circuit Court of Appeals would have ample power to make a final disposition of the case.

The respondents' motion for a new trial first asked that the trial court should *set aside* the verdict and judgment (Rec. 204). The motion for new trial was then followed by a specification of errors by the trial court, which repeated the refusal of the trial court to consider the repeated defense that the respondents refused to warrant the goods.

If, in drafting this motion, the respondents, instead of using the words "a new trial" had used the words "demand judgment," the motion would have constituted a proper and sufficient motion for judgment notwithstanding the verdict. Rule 50(b) does not require that a motion for judgment notwithstanding the verdict itself shall specify any grounds, but that the motion for judgment notwithstanding the verdict shall be "in accordance with his motion for a directed verdict."

It has been held that a party's motion for a directed verdict not only includes the written grounds specified in the motion, but also the previous arguments of the respondents in support of their previous motions throughout the case. (*Dawson* v. *McWilliams*, 146 F. (2d) 38; *Pickering* v. *Corson*, 108 F. (2d) 546.)

Throughout the trial, as we have previously specified, the respondents kept bringing to the trial court's attention their defense that they refused to warrant the goods. This was ignored by the trial court and by the petitioner.

Assuming, without conceding, that Rule 50(b) applied to the case at bar relative to a post-verdict motion, it was fully complied with by the respondents' motion for a new trial, so that either the trial court or the Circuit Court of Appeals had the power to enter final judgment for the respondents.

Rule 50(b) is not mandatory that *both* motions, that is to say, a motion for a new trial and a motion for judg-

ment must be made within ten days after the reception of a verdict in order for the trial court to grant the *previous reserved* motion of a party for a directed verdict. The rule reads that:

> "Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside, and to have judgment entered in accordance with this motion for a directed verdict; * * *."

(The respondents in their motion for a new trial asked that the verdict and judgment of the trial court should be *set aside*.) The rule then provides that a motion for a new trial *may* be joined with a motion for judgment or a new trial may be prayed for *in the alternative*. Assuming, without conceding, that Rule 50 (b) applied to the case at bar, the respondents simply chose one of the alternatives in its post-verdict motion, namely, a motion for a new trial.

Again, if it is assumed, without conceding, that Rule 50(b) applied to the instant suit, the matters set forth in the respondents' motion for a new trial, coupled with the respondents' previous motion for a directed verdict at the conclusion of all the evidence in the case and their previous arguments throughout the trial, were a sufficient basis for the trial court and the Circuit Court of Appeals to enter judgment for the respondents, in accordance with their *previous reserved* motion for a directed verdict.

The following language in Rule 50(b) is pertinent to this precise point and this language is:

> "Whenever a motion for directed verdict, made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to a jury, subject to a *later*

determination of the legal questions raised by the motion." (Italics ours.)

Since the respondents' motion for a directed verdict, coupled with the previous arguments of the respondents, were specific and sufficient for the entry of judgment for the respondents, the "*later determination* of the legal questions raised by the motion for a directed verdict" must be construed to mean that this *later determination* could be had by either a motion for a new trial or a motion for judgment notwithstanding the verdict. The detailed and comprehensive motion of the respondents for a new trial was sufficient under Rule 50(b), if it applied to the instant suit, for a post-verdict *later determination* of the previous reserved motion of the respondents for a directed verdict, so that the Circuit Court of Appeals had the power to direct the entry of judgment for the respondents.

4.

No part of Todes' deposition was admitted in evidence. The record is clear that the entire Todes deposition was excluded by the trial court.

The Circuit Court of Appeals in its opinion on the petition for rehearing, held correctly that no part of Todes' deposition was ever admitted in evidence (Rec. 258). The respondents filed in the Circuit Court of Appeals certain suggestions wherein they erroneously stated that some fragments of the Todes deposition were admitted in evidence. As we will see in a moment when the exact record is described to this Court, the respondents were in error when they filed these suggestions.

In the respondents' original brief in opposition to the petition for certiorari, in order to crystalize the propositions of law involved in the instant case, respondents conceded that certain portions of the Todes deposition

might be considered as having been introduced in evidence. We now find, after a careful rechecking of the record, that we were in error in making this concession. A careful examination of the record of the trial court shows clearly and conclusively that the Circuit Court of Appeals was entirely correct that no part of the Todes deposition was admitted in evidence.

Here is what the record actually shows: Until the trial court granted the petitioner's motion for a directed verdict, the trial was a trial by jury. The petitioner did not request a trial by jury, but only the respondents requested a jury trial.

At the conclusion of the petitioner's case, the respondents made an oral motion for a directed verdict. The jury retired from the courtroom and oral arguments on the motion were commenced (Rec. 116). The trial court denied this motion of the respondents for a directed verdict (Rec. 120). *While the jury were still excluded from the courtroom, the petitioner presented an oral motion for a ruling in advance as to the anticipated evidence of the respondents, which the petitioner contended should be excluded because of the parol evidence rule.* Practically all of this anticipated evidence was contained in the Todes deposition which was then on file in the case. There was a long argument on this motion, and the trial court announced that he would rule against the respondents on this point involving the parol evidence rule (Rec. 143).

The jury then were brought back into the courtroom (Rec. 143) and the Todes deposition was then opened and was about to be read when the trial judge again had the jury excluded from the courtroom (Rec. 144).

During the entire time that the jury was again excluded from the courtroom, there was a long colloquy

between counsel and the trial court concerning the Todes deposition. The first portion of the deposition that was read or considered by the judge was that part which commenced with the first objection of counsel for the petitioner to the deposition, and it appears at typewritten page 6 of the deposition (Rec. 144).

Regardless of the petitioner's emphatic statements that the previous pages of the Todes deposition were considered by the trial court, the record shows that they were not, and these previous pages relate to the alleged evidence that the respondents dealt in quantities of tequila through Todes. (We will comment on this portion of the deposition later.)

The trial court ruled that practically every portion of the Todes deposition would be excluded, except a fragment or two that the judge said "might stand."

After the colloquy between counsel and the court concerning the Todes deposition was completed, the jury then took their places in the jury box (Rec. 161). It is important to note, however, that during the entire time the trial judge was considering the deposition, *the jury were excluded from the courtroom.* The petitioner was then obviously satisfied with his success in having excluded practically the entire deposition of Todes, and the petitioner made no effort to read in open court, *in the presence of the jury, at any time* a single word of the Todes deposition.

After the trial court directed the jury to return a verdict for the plaintiff, and after a directed verdict was returned by the jury, then the court entered judgment on the verdict (Rec. 177). That was the end of the case so far as a trial by jury was concerned.

After the court entered judgment on the verdict, then respondents' counsel, with the approval of petitioner's

counsel, called the trial court's attention to the fact that the trial judge had ruled that a few fragments of the Todes deposition would be admitted in evidence (Rec. 177). However, this fragment or two were never read into the record *in the presence of the jury.*

Accordingly, after a careful rechecking of the record, the results of which we have just detailed to Your Honors, it appears clearly and conclusively that no part of the Todes deposition was ever properly introduced in evidence in the presence of the jury during the course of the trial.

In the respondents' brief in opposition to the petition for certiorari, we erroneously stated that an important fragment of the Todes deposition (Rec. 154) was left in the record and this involved the admission of Lazarus contained at page 23 of our brief in opposition to the petitioner for certiorari. At page 27 under footnote 19, of the petitioner's additional brief, the petitioner quoted a portion of the Todes deposition that it had been successful in having excluded by the trial court. (Later in this brief we will comment briefly as to this excluded evidence and the entire Todes deposition.)

In spite of the previous confusion of both counsel as to what actually happened in the trial court as to the Todes deposition, a careful re-examination of the record shows that it is clear beyond doubt that no part of that deposition was ever read in open court *in the presence of the jury* at any time.

Until the trial court directed a verdict for the petitioner, the hearing was a trial by jury, and those portions of the Todes deposition that the petitioner now fallaciously insists were introduced in evidence, should have been read to the jury before they could be con-

sidered as having been introduced in evidence. There is nothing novel about this proposition. It was asserted by this Court in the early case of *Hodges* v. *Easton*, 106 U. S. 408, which is cited frequently in petitioner's original and additional briefs. At page 10 of the petitioner's reply brief in support of its petition for certiorari, the petitioner under footnote 4 cites *Barney* v. *Schmeider*, 9. Wall. 246, and *Hodges* v. *Easton*, 106 U. S. 408. In commenting on these cases the petitioner erroneously states that they hold that even when a trial judge directs a verdict, the evidence must be "*submitted* to the jury," or that the "participation" of a jury is essential even in a directed verdict case. This is absurd as well as inaccurate. In using the words "submitting" the evidence to the jury, and that "participation" by a jury is essential, the petitioner was hinting at the preposterous idea that under federal court decisions, even when a trial court directs a verdict, the evidence must be "submitted" to the jury for their independent judgment or determination of the facts. This is ridiculous as well as inaccurate. The holdings in these cases of *Barney* v. *Schmeider* and *Hodges* v. *Easton* were that where the trial court directs a verdict, the evidence must be heard, read to, or presented *in the presence of the jury.* (*Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 382, 424, 425.) That is all the words "submitted" to the jury or "participation" by a jury mean in directed verdict cases. These words cannot be violently distorted to mean that when the trial court directs a verdict, the evidence must be "submitted" to the jury for their independent determination or judgment of the facts. In directed verdict cases all the "submitting" of evidence and all "participation" by the jury in these cases ceases in effect, as soon as the court directs the jury to return a verdict. In the instant suit, *all of the evidence admitted by the trial court in behalf of the petitioner was heard and given in the presence of the jury.*

Even after excluding from the consideration of this case the fragment of the Todes deposition contained in Lazarus' admission, detailed at page 23 of our original brief, it still must follow, as a matter of law, under the undisputed facts, that the Circuit Court of Appeals was entirely correct in holding that the plaintiff failed to prove any claim against the defendants. The petitioner's entire case was predicated on an alleged express warranty of quality, and the petitioner failed to prove a word or syllable in support of this alleged warranty. Until the petitioner would have proven the existence of an alleged express warranty, the respondents were under no duty to prove their defense that they refused to give any warranty as to the goods because of their agency status.

It is clear beyond any doubt that the Circuit Court of Appeals held correctly that no part of the Todes deposition was ever admitted in evidence.

5.

The history, purposes and wording of Rule 50(b) of the Federal Rules of Civil Procedure establish beyond all doubt that the Rule does not apply to a directed verdict where the court grants a motion for a directed verdict without submitting the case to the jury for its independent determination of the facts.

The petitioner's position in this court is inconsistent. In its petition for certiorari and in its reply to the respondents' brief in opposition to certiorari, the petitioner took the position that the Circuit Court of Appeals had no power to enter a final judgment in the instant suit because of the constitutional barrier of the Seventh Amendment, which prohibited that court from entering final judgment in a case tried before a jury in the trial

court. In taking this initial position, the petitioner displayed no embarrassment over its successful efforts in the trial court in avoiding the independent verdict of a jury in the lower court.

In its additional brief, the petitioner reverses the field, so to speak, and apparently has abandoned its jury trial constitutional point, and the petitioner now takes the position that since there was no conflicting evidence introduced in the trial court, questions of law only were presented, which authorized the trial judge to make a final disposition of the case pursuant to his entry of judgment on a directed verdict, and that the trial court's judgment should be affirmed.

It is obvious that Rule 50(b) was adopted to permit the trial court to reserve his ruling on a motion for a directed verdict so that re-trials upon reversals in courts of appeals could be kept down to a minimum. The rule automatically reserves for later determination the legal questions raised by a motion for a directed verdict.

If the trial court, after a verdict for one party is returned by the jury, enters judgment for the other party on his previous reserved motion for a directed verdict, upon appeal, if the judgment is reversed, the verdict of the jury is reinstated and a re-trial is prevented. This has happened repeatedly, and this result followed when this Court reversed final judgments of Circuit Courts of Appeals for defendants in jury cases and reinstated the original verdicts of the jury and judgment in behalf of the plaintiffs. Your Honors followed this procedure in *Halliday* v. *U. S.*, 315 U. S. 94, *Berry* v. *U. S.*, 312 U. S. 450, and *Conway* v. *O'Brien*, 312 U. S. 492, and reference to this procedure in these three cases was made by Your Honors at page 215 of the *Cone* decision.

As we argued in our original brief that, if in the *Cone* case, the defendant had made a motion for judgment notwithstanding the verdict, the Circuit Court of Appeals still would not have had the power to enter a final judgment for the defendant on appeal, as the general verdict of the jury in favor of the plaintiff in that case was based on erroneous evidence introduced in behalf of the plaintiff, and the case would have had to be remanded to the trial court for a new trial, as the case was still a potential jury case that required a trial by jury.

We believe it is plainly evident that the very wording, history and purposes of Rule 50(b) can only mean that it applies to cases that "go to the jury" for their "independent, voluntary consideration and verdict as to contested facts." This was the language used by the Circuit Court of Appeals in its opinion on the petition for rehearing (Rec. 260), and the idea expressed by these words obviously is not novel.

The existence of three elements are necessary to invoke the application of Rule 50(b). First, the ruling on the motion for a directed verdict must be reserved. Obviously if a motion for a directed verdict for one of the parties is immediately granted, as soon as it is made, nothing is reserved. Secondly, the case must be submitted to the jury, and third, there must be a *later determination* of the legal questions raised by the previous motion for a directed verdict.

Let us talk about the second element, "submitting the case to the jury subject to a later determination * * *". Can any reasonable person contend that this means anything else but that the jury must consider the case and exercise their own judgment and make their independent determination of conflicting evidence?

The hypertechnical distortions of the words "submitted to the jury" constantly urged by the petitioner in all of

its briefs must be brushed aside on the basis of their own authorities of *Hodges* v. *Easton*, 106 U. S. 408, and *Barney* v. *Schmeider*, 9 Wall. 248.

Now we come to the third element, "the later determination" of the legal questions raised by the motion. These important words in the rule cannot be disregarded and treated as surplusage. They mean exactly what they say, namely, that after the jury's verdict is returned, then, *and not until then*, does the trial court make a later determination of the previous reserved motion for a directed verdict. Because of this third element of "later determination" itself, it is obvious that the rule does not apply and cannot apply to a motion for a directed verdict that is immediately granted by the trial court. There never is any "later determination" of any legal questions when the court enters a directed verdict without submitting the case to the jury for their independent judgment on the facts.

The very title of the rule, "Reservation of Decision on Motion," establishes that Rule 50(b) only applies to cases that go to the jury for their independent voluntary consideration and the exercise of their own judgment on the evidence.

Rule 50(b) was held by this Court to apply in numerous cases, including the *Cone* case, *Halliday* v. *U. S.*, 315 U. S. 94, *Berry* v. *U. S.*, 312 U. S. 450, *Conway* v. *O'Brien*, 312 U. S. 492, because in each of these cases the trial court did not enter motions for directed verdict, but permitted the cases to go to the jury for the exercise of their independent voluntary consideration and their own judgment on the contested facts.

That is not the situation in the case at bar where the petitioner admits that there is no conflicting evidence. In support of its contentions, the petitioner has resurrected

the 35 year old case of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, and several older cases that are fully discussed in both the majority and minority opinions in the *Slocum* decision. There was nothing revolutionary decided in the *Slocum* case and the substance of the principles of law in that case is the law today. Professor Schofield in 8 Illinois Law Review 287, cited by the petitioner in all its briefs, wrote a very comprehensive article on the *Slocum* decision and new trials and the Seventh Amendment. On the very first page of this article (p. 287) Professor Schofield made a penetrating and decisive analysis of the *Slocum* case by pointing out that all it held was that the Seventh Amendment "compels the Circuit Court of Appeals to order a new trial when, for want of evidence enough for a jury to act on by finding a verdict for the plaintiff, it reverses a judgment for the plaintiff entered on a general verdict for the plaintiff, arrived at by the jury *by the exercise of their own judgment on the evidence*, finding a material fact; and forbids the Circuit Court of Appeals to direct judgment for the defendant on the evidence in disregard of the general verdict for the plaintiff. The reason is, that the rules of the common law referred to in the Seventh Amendment forbid any federal tribunal but another jury on a new trial *to find a material fact different from* the finding of a jury; * * *" (Italics ours.)

At page 36 of its additional brief, the petitioner unwittingly quotes portions of the *Slocum* case which emphasize that in a jury trial it is the exclusive function of the jury to "pass on *issues* of fact."

In the *Slocum* case the court denied the motion of the defendant for a directed verdict. The defendant in that case did not ask the trial court to reserve its ruling on the questions of law presented by its motion for a directed verdict, so that the case could go to the jury for

its verdict, subject to a later determination of the legal questions that could have been reserved by the motion for a directed verdict. This procedure had been followed for many years in the past and was in use even at the time of the adoption of the Seventh Amendment. That was pointed out by this Court in its later decision in *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 659, 660.

Since in the *Slocum* case the defendant did not ask the trial court to reserve its ruling on the defendant's motion for a directed verdict for a later determination after the jury's verdict, this Court held that the constitutional barrier of the Seventh Amendment prohibited the Circuit Court of Appeals from making a final disposition of the case. Later, when the *Redman* case reached this Court, Your Honors pointed out in that decision that the defendant in that case expressly requested the trial court to reserve its ruling on its motion for a directed verdict so that the Circuit Court of Appeals had the power, upon reversing judgment for the plaintiff, to enter final judgment for the defendant. In that case there was a general verdict rendered by the jury for the plaintiff.

Rule 50(b) was adopted in contemplation of both the *Slocum* and *Redman* cases, and the rule automatically reserves for later determination the legal questions raised by a previous motion for a directed verdict.

In its various briefs filed in this Court, the petitioner contends that Professor Schofield's treatise states that the *Slocum* case is authority for the proposition that even in directed verdict cases the Circuit Court of Appeals cannot reverse a lower court judgment and enter a final judgment for the other party. Professor Schofield in his Law Review article wrote nothing of the kind. On the contrary, he reached the opposite conclusion. Here are

the pertinent quotations from Professor Schofield's article in his comment on the *Slocum* case:

> "*The directed verdict on a material issue of fact and the Seventh Amendment.*—The way the opinion of Van Devanter, J., employs *Baylis* v. *Travellers' Insurance Co.* along with *Barney* v. *Schmeider*, 9 Wall. 248, and *Hodges* v. *Easton*, 106 U. S. 408, to support the majority's result, caused the minority to think the majority intended to say, and do say, the verdict of a jury returned in passive obedience to a peremptory instruction of a trial judge is an indispensable thing of substance under the Seventh Amendment and not a dispensable thing of form. *No such point was before the court, as there was no directed verdict in the case.*" (p. 297, Footnote 14.)
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> "A fact tried, *i. e.*, found by a *peremptorily directed verdict* cannot be a 'fact tried by a jury,' within the meaning of the Seventh Amendment, whether the case turns on a question of fact, or on a question of law. A motion for a directed verdict is a proceeding whereon the trial judge determines from the evidence whether there is a material issue of fact for trial by a jury, not unlike the proceeding *in jure* in Roman civil procedure before the praetor resulting in the *litis contestatio*, or formulation and knitting of the issue, before the case passed *in judicio* before the *judex* for a trial of the issue and rendition of the *sententia* or judgment (Sohm, Institutes of Roman Law, Ledlie Tr., 2nd ed., 237-241); and not unlike our proceeding before the equity judge when he formulates an issue of fact for trial by a jury in a common-law court. *When the trial judge peremptorily directs a verdict, he thereby decides there is no material issue of fact arising on the evidence for trial by a jury.* When the trial judge is reversed by a court of error or appeal for peremptorily directing a verdict on the evidence in a case that turns on a question of fact, not of law, the con-

sequence is that he denied the right of trial by jury secured by the first clause of the Seventh Amendment and the reversing judgment must order a trial by jury, for there never was any trial by jury. *The second clause of the Seventh Amendment has no application to a case where the trial judge directs a verdict; it comes into play only after a verdict found by a jury on a material issue of fact;* it regulates and controls the proceedings after the verdict of a jury, not before; the proceedings before the verdict of a jury are regulated and controlled by the first clause exclusively." (pp. 297 & 298, Excerpts from Footnote 14.) (Italics ours.)

Professor Schofield also pointed out that the *Slocum* case, which "went to the jury" in the trial court, involved a material *issue of fact* found by a jury. The following quotations from his article demonstrate this:

"It is plain, as it seems to me, the majority in the *Slocum* v. *New York Life Insurance Co.* reached the only allowable result in the case before the court on the constitutional jury-trial point they decided; and the judgment of the court on that point ought to have been unanimous, but with a less comprehensive opinion. The trouble in the court arose out of the neglect of the justices to allow themselves to be restrained by the fact the *case before them turned on a material issue of fact found by a jury.*" (p. 290)

* * *

"The case was not one turned on a pure question of law that ruled the case; there was no doubtful point of law in the case at all * * *. *The case turned on a pure question of fact, i. e.,* waiver *vel non.* The trial judge refused to direct a verdict for the defendant on the fact of waiver; and the jury found a general verdict for the plaintiff *by the exercise of their own judgment on the evidence,* thus finding the fact of waiver in favor of the plaintiff." (p. 294.) (Italics ours.)

The *coup de grace* as to the petitioner's misconception of Professor Schofield's article is furnished by its last sentence in discussing the *Slocum* case, that "there was no case before the court turning on a pure question of law such as to rule the case; the case before the court turned on a pure question of fact found by a jury in favor of the plaintiff." (p. 487)

A comparison of the *Slocum* and *Redman* cases shows that there is no real conflict between the two cases. Professor Schofield pointed out that the *Slocum* case essentially involved a question of fact to be determined by a jury. The *Redman* case did not involve any question of fact, as the facts were undisputed, and only a question of law was involved so that the Circuit Court of Appeals had the power to enter a final judgment for the defendant in that case on its motion for a directed verdict made in the trial court.

Since the petitioner concedes that there was no conflicting evidence in the case, questions of law only were presented for decision at the conclusion of all the proof by both parties in the case. Both parties thereupon made respective motions for directed verdicts. Respondents' motion was promptly denied, and petitioner's motion for a directed verdict was immediately granted.

Although under Rule 50(a) of the Federal Rules of Civil Procedure, when both parties made motions for directed verdicts, this did not constitute a waiver of a trial by jury, it must follow that insofar as the petitioner was concerned, when its motion for a directed verdict was granted without having the jury pass on the case, this effected a waiver of a trial by jury by the petitioner. When the trial judge immediately granted the petitioner's motion for a directed verdict without having the case passed on by a jury for their inde-

pendent judgment, this action of the trial judge at that point treated the case as a trial by the court without a jury.

Immediately after the directed verdict was entered, the trial judge entered judgment for the petitioner against the respondents. (Rec. 177)

It is incongruous from this state of this record for the petitioner to urge that it then become necessary for the respondents to file a motion for judgment notwithstanding the verdict, to enable the Circuit Court of Appeals to make a final disposition of the case. Under those circumstances, any motion of this nature by the respondents could only be a motion for judgment "notwithstanding the judgment" and that would have been senseless as well as an empty, meaningless ritual.

Since the petitioner admits that there is no conflicting evidence, the procedure of the trial judge meant that he had exercised his judgment on a matter of law without the intervention of any determination of the facts by a jury. There was no true jury verdict in this case, so that it was unnecessary for the respondents to file a motion for judgment notwithstanding the verdict to enable the Circuit Court of Appeals to make a final disposition of the case.

Where, as in the case at bar, the trial court peremptorily directs a verdict without permitting the jury to exercise their own independent voluntary judgment on the facts, the court has immediately acted on a question of law and, for all practical purposes, has ended the trial of the law suit and has decided the issues involved.

Along these lines, the Supreme Court of Illinois recently, on November 17, 1947, handed down an opinion in

Jackman v. *North*, 398 Ill. 90, 103, 104. In that case the trial court directed the jury to return a verdict for the defendants, and the court thereupon gave the following instruction:

> "We the jury find the will in question is the last will and testament of Louise B. Paulson, deceased, and on order of court verdict is by the jury returned accordingly and the clerk will so enter it. The jury is discharged."
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> * * *

This opinion then states:

> " 'The peremptory instruction to find for the plaintiff was, in effect, taking the case from the jury. When the court directs a verdict an issue of law is raised upon the whole case, and there is no fact for the jury to find. * * *' The principle announced in that case is controlling here. The giving of the peremptory instruction took the case from the jury and the record before us is sufficient to show that fact. *The formal return of a verdict by the jury would not add anything to the record already made.*" (Italics ours)

These principles are not in conflict with the petitioner's cases of *Hodges* v. *Easton*, 106 U. S. 408, and *Barney* v. *Schmeider*, 9 Wall. 248, as in these cases the rule is laid down that when the court instructs the jury to return a directed verdict, *before* the verdict is directed the jury must hear all of the evidence in the case that is admitted by the court. This requirement was met in the case at bar, and was also met in this last cited case of *Jackman* v. *North*.

We pointed out in our original brief in opposition to the petition for certiorari, at pages 17-19, that where the trial court directs a verdict without submitting the case to the jury for the exercise of their own judgment on the evidence, the trial court has exercised its judgment on a matter of law, and that the rendition of a verdict by the jury is a mere formality. We cited cases that the

jury could not disobey the trial court, who could compel obedience to his order for a directed verdict.

At page 11, under footnote 5 of its original petition for certiorari, at page 10 under footnote 4 of the petitioner's reply brief in support of its petition for certiorari, and at page 31 under footnote 21, the petitioner poses a supposed "paradox". This so-called paradox is, that it is not clear to the petitioner how the Circuit Court of Appeals can instruct a District Court to direct a verdict where the jury has already been discharged. A simple test proves the unsoundness of this so-called paradox.

The Cone decision holds that when the facts are undisputed and questions of law only are involved, the Circuit Court of Appeals can enter a final judgment after reversal. It is clear from the *Cone* decision that when a trial court improperly denies a defendant's motion for judgment notwithstanding the verdict, the Circuit Court of Appeals can enter judgment for a defendant and the previous discharge of the jury by the trial court is not a bar to this final disposition by the Circuit Court of Appeals.

This so-called paradox was no problem to this court when it ordered a final disposition in favor of the defendant in the *Redman* case. Thus, it is seen from these simple tests that this paradox becomes a paradox lost.

At this point we would like to summarize our comment concerning four old cases that are cited repeatedly in all of the petitioner's briefs. The character of most of these cases are aptly described in the dissenting opinion of Justice Hughes in the *Slocum* case. *Hodges* v. *Easton*, 106 U. S. 408, involved a jury trial and certain alleged undisputed facts were never heard by or submitted to the jury, and this Court held on appeal that the insuffi-

cient record afforded no basis for the lower court's judgment and that on appeal this court could not ascertain whether these facts were undisputed, and that there was no alternative but to direct that a trial be had "upon all the material issues of fact" (p. 425, *Slocum* decision).

In *Barney* v. *Schmeider*, 9 Wall. 248, in a jury trial, the testimony taken at a former trial was not read to the jury. At page 424 of the *Slocum* dissenting opinion Justice Hughes, in describing this case, said:

> "The court overruled the contention that there was not a disputed question of fact, saying, after reviewing the case, 'Where there is any discrepancy, however slight, the court must submit the matter to which it relates to the jury, because it is their province to weigh and balance the testimony and not the court's. The proposition is not, therefore, sustained, that nothing but a question of law was to be decided.'"

In *Baylis* v. *Travellers' Insurance Co.*, 113 U. S. 316, at page 426 of the dissenting opinion in the *Slocum* case, Justice Hughes said:

> "The pith of the decision is that, despite what the trial judge said regarding the matter, there were really questions of fact for the jury, and that the trial judge could not take the place of the jury in deciding them."

Suydam v. *Williamson*, 20 How. 42, is cited under footnote 23 at page 37 of the petitioner's additional brief. It is a mystery to us why the petitioner cited this case, and also the sentence at page 37 of the additional brief which ends with a reference to footnote 23. This very sentence itself is decisive of the procedural question in this case, namely, that both the trial court and the Circuit Court of Appeals, on review, can make a final disposition of the case, where only legal questions are involved and a directed verdict has been entered by the trial court. This damaging sentence reads:

> "The practice of reserving the legal questions in order to permit the *final disposition* of the proceedings without a new trial was followed not only in independent verdict cases, but also in directed verdict cases." (Italics ours).

In summarizing this discussion relative to Rule 50(b), we believe that the crucial words "later determination" by themselves indicate that the rule has no application where a directed verdict is entered without submitting the case to the jury for its independent voluntary consideration and verdict. The very act of the trial judge in granting a motion for a directed verdict without submitting the case to the jury is tantamount to an *immediate determination* of the legal questions raised by the motion for a directed verdict. The conclusion is therefore inescapable, that this pointed language in Rule 50 (b) establishes that the rule can only apply to cases where the trial court reserves its ruling on the legal questions involved in motions for a directed verdict, and submits the case to the jury for its independent voluntary determination of the facts.

We believe we have demonstrated beyond doubt that Rule 50(b) does not apply where the trial court takes the case from the jury and grants a motion for a directed verdict without submitting the case to the jury.

6.

The final order entered by the Circuit Court of Appeals in the instant suit for judgment in behalf of the Respondents is not in conflict with the decision of this court in the case of Cone v. West Virginia Pulp & Paper Co.

In the *Cone* case the trial court submitted the entire case to the jury for its independent voluntary consideration and verdict, and the jury returned a verdict for

the plaintiff. In that case the facts were controverted. The plaintiff's proof in that case as to possession was held to be insufficient by the Circuit Court of Appeals, so that the inference follows that the plaintiff might introduce sufficient proof of possession at a new trial. Moreover, in that case evidence was improperly admitted in the trial court in behalf of the plaintiff.

In the *Cone* case and in the *Halliday, Berry* and *Conway* cases (mentioned in the *Cone* decision), even if the losing parties had filed in the trial court motions for judgment notwithstanding the verdict of the jury, nevertheless the Circuit Court of Appeals would still have been without power to reverse the judgments of the trial court and to enter judgment for the losing party in the trial court, because in each of these cases there were controverted questions of fact involved that had been or would have to be passed on by a jury because of the constitutional right to a trial by jury by the winning party in the trial court.

It is important to note the portion of the opinion of this Court in the *Cone* case that evidence was improperly admitted in behalf of the petitioner by the trial court. No such situation exists in the case at bar. No point was made in the instant suit that the trial court imporperly admitted any evidence in behalf of the petitioner. Accordingly, in the *Cone* v. *West Virginia Pulp & Paper Co.* case, in order to relitigate the entire case and permit the petitioner one more chance to introduce, if it could, proper and sufficient evidence to supplant the petitioner's evidence that originally was *improperly* admitted, this Court remanded the case to the trial court for a new trial.

That is not the situation in the case at bar. The petitioner admits that there is no conflicting evidence in the record. Therefore, only a question of law is involved

as to the correctness of the final decision of the Circuit Court of Appeals.

The petitioner had full opportunity in the trial court to offer all the competent evidence that it had available. Petitioner's counsel was present when the deposition of Todes was taken and cross-examined him at length. Todes' deposition was taken December 24, 1945. Counsel for the petitioner had an opportunity of at least two and one-half months to study the deposition of Mr. Todes before the trial of the case was commenced. The petitioner could have introduced on its own motion any part of the deposition of Todes as part of its proof. Instead of doing this, the petitioner saw fit to exclude the entire deposition as evidence in the case. It therefore comes with poor grace for the petitioner at this time, on appeal, to seek to use any part of the Todes deposition that it successfully excluded in the trial court.

The petitioner relied solely on an express warranty. In the trial court it was warned on at least five occasions of the respondents' chief defense that they refused to give any warranty as to the goods. This defense covered not only an alleged express warranty, but also an alleged implied warranty. Because of the sole reliance in petitioner's complaint of an express warranty, it was incumbent on the petitioner to prove the case upon which it relied, and it failed wholly to do so.

After the trial court peremptorily directed a verdict against the respondents, their motion for a new trial again called to the trial court's attention, as well as the attention of the petitioner, that they were deprived of establishing their defense that they refused to give any warranty. Here again the petitioner was amply warned of its failure to prove the basis of its case, namely, the alleged express warranty.

Inasmuch as the petitioner's proof was fully developed in the trial court, and none of its evidence was improper or erroneous, the final disposition of the case by the Circuit Court of Appeals on the undisputed evidence should be upheld by this Court.

The *Cone* case and the other cases mentioned in that decision all involved controverted questions of fact requiring a trial by jury, so that Rule 50(b) was applicable to those cases. The case at bar involved undisputed facts where only questions of law were presented for determination. In our opinion the following portions of the decision in the instant case by the Circuit Court of Appeals on rehearing are pertinent as to our contention that the *Cone* decision is not in conflict with the final disposition of the instant case by the Circuit Court of Appeals. That court held in commenting on the *Cone* decision that:

> "The Supreme Court did not hold that if such a motion had been made and overruled, the Circuit Court of Appeals could not have directed, if warranted in law, the District Court to sustain the motion of the defendant for a directed verdict. Nor did the Supreme Court hold that a Circuit Court of Appeals may never dispose of a case where only errors of law are involved.
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> * * * * *
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> Rule 50 (b), in our opinion, applies only to cases where the matter is submitted to a jury for its independent voluntary consideration and verdict. Where the court directs a verdict for the plaintiff, as in the instant case, the matter is not submitted to the jury for it to exercise its independent judgment on the facts. The court has exercised its judgment on a matter of law. Where the court, as in the instant case, has sustained the motion of the plaintiff for a directed verdict, the legal consequence is the same as if the District Court had submitted the case

to the jury, the jury had returned a verdict for the plaintiff, and the District Court had overruled the motion of the defendants for judgment notwithstanding the verdict" (Rec. 259, 260).

In the instant suit, since the petitioner was told that the respondents did not handle or have possession of the goods, and the petitioner did not rely on the skill, choice or selection of the goods by the respondents, under the uniform and settled authorities on this point discussed in our brief in opposition to *certiorari* at pages 33-34, there can be no implied warranty of any kind in the transaction in the suit at bar.

7.

The motions of the Respondents for a directed verdict were sufficient and adequate. These motions included the previous arguments of the Respondents throughout the case and both the motions and the previous arguments included the basis of the reversal and the directions of the entry of judgment for the Respondents by the Circuit Court of Appeals.

The cases are clear that the respondents' written motion for an instructed verdict at the conclusion of all the evidence should be construed with the previous oral argument of the respondents in support of their oral motion for an instructed verdict at the conclusion of the petitioner's case, and both the motion and the arguments and reasons in support thereof should be construed together (*Dawson* v. *McWilliams*, 146 F. (2d) 38; *Pickering* v. *Corson*, 108 F. (2d) 546).

Although the agency phase of the case may have been stressed in paragraphs numbered 1 and 2 in respondents' written motion for an instructed verdict (Tr. 202), these specific grounds should be construed with the previous defense of the respondents set forth in their amended

answer and mentioned throughout the trial of the case, that they were not liable to the petitioner in the transaction because the respondents refused to warrant the quality of the goods in view of their agency status in the transaction. We argued this point at pages 26 to 29 of our original brief in opposition to certiorari.

As we stated heretofore, the petitioner was amply warned of the respondents' defense that they refused to warrant the goods. This was contained in the respondents' opening statement, in their amended answer, in their argument in support of their oral motion for a directed verdict at the conclusion of the petitioner's proof, in their argument on the petitioner's successful motion to exclude the Todes deposition, and in their argument at the conclusion of all the evidence when each of the parties made a motion for a directed verdict. This was supplemented by the defendants' motion for a new trial.

The petitioner was repeatedly told during the trial of the case that the respondents refused to give any warranty as to the goods.

Even though Rule 50 (a) of the Rules of Civil Procedure provides that a motion for directed verdict shall state the specific grounds therefor, technical precision need not be observed in stating the grounds for such motion. It is sufficient if the grounds are sufficiently stated to apprise the trial court clearly as to movant's position with respect to the motion (18 Hughes Federal Practice (1940), Sec. 24403). The petition, at page 40 of its additional brief, cited three cases on this point relating to the requirement of specific grounds in the motion for a directed verdict. We will now briefly discuss these cases.

In *Virginia-Carolina Tie & Wood Co.* v. *Dunbar*, 106 F. (2d) 383, the trial court denied a motion for a directed verdict. In this decision it was pointed out that if the grounds for a motion for a directed verdict are sufficiently stated to apprise the other party fairly as to movant's position with respect to the motion, the motion is sufficient, and it was also pointed out in that case that technical precision need not be observed for stating the grounds for such a motion.

In *Atlanta Greyhound Corporation* v. *McDonald*, 125 F. (2d) 849, it appears that a trial court properly denied the motion for a directed verdict even though the grounds for the motion were specifically stated.

In *Ryan Distributing Corporation* v. *Caley*, 147 F. (2d) 138, the trial court entered a judgment on a directed verdict for the plaintiff and the grounds for the motion were properly stated in the trial court.

We fail to see how any of these cases are in point here.

The respondents' written motion for an instructed verdict, filed at the conclusion of all the evidence in the case, should be interpreted in the light of the various points and authorities that have been repeatedly argued by the respondents during the course of the trial, in accordance with *Dawson* v. *McWilliams*, 146 F. (2d) 38, and *Pickering* v. *Corson*, 108 F. (2d) 546.

The third point in the defendants' motion for an instructed verdict must be construed in connection with their five separate and previous positions in the trial court, where they repeatedly informed the petitioner that one of the chief defenses of the respondents was that they refused to warrant the goods because of their agency status.

Throughout the trial and during the oral argument at the conclusion of all the evidence, when the motions of both parties for a directed verdict were argued, petitioner was informed of the respondents' defense that they refused to warrant the goods. Accordingly, the record is overwhelming that the grounds of the respondents' motion for a directed verdict were fully and adequately stated in accordance with Rule 50 (a) of the Federal Rules of Civil Practice.

8.

No Implied Warranty.

Even if petitioner's complaint had relied on an alleged implied warranty of quality, the petitioner failed to prove that the respondents were dealers of the goods, which is required under Section 15(2) of the Uniform Sales Act of Illinois.

Neither the petitioner nor the trial judge mentioned anything about an implied warranty during the trial of the case. If was not a factor in the case under the pleadings, the admitted evidence, the arguments and the various other events during the trial. Had the defendants made a motion for judgment in the trial court after the directed verdict was entered, the trial court would have promptly denied the motion, and the trial court would have made no comment or taken any action regarding any alleged implied warranty as this element was simply not considered throughout the trial. The petitioner first mentioned anything about an implied warranty in the Circuit Court of Appeals after arguments were had. Therefore, what justification can the petitioner have for arguing in this court that the petitioner was relying on an implied warranty in the trial court?

At pages 35-38 of our original brief in opposition to the petition for certiorari, we argued that the existence

of an alleged express warranty excluded an implied warranty as to the same subject matter. An express warranty follows because of the *refusal* of the buyer to buy, *unless* the seller makes an actual express warranty, that is to say, unless the seller makes written or oral representations as to quality, etc. On the other hand, a claim on an implied warranty is not predicated on any reliance by the buyer as actual representations which exist when an express warranty is made. Consequently, an express warranty is inconsistent with an implied warranty as to the same factors.

At pages 36 and 37 of respondents' original brief in opposition to the petition for certiorari, we cited a number of authorities where recovery was denied to buyers who pleaded the existence of an alleged express warranty but did not introduce evidence in support thereof, and sought to rely on the existence of an implied warranty as to the same subject matter.

The inconsistencies and contradictions between express and implied warranties as to the same subject matter has been firmly established and has not been changed by the Uniform Sales Act. Section 15(6) of the Sales Act (Ch. 121½, Ill. Rev. Stat. (1945) par. 15, p. 2953) provides: "An express warranty or condition does not negative a warranty or condition implied under this Act, unless inconsistent therewith." This particular provision does not make any reference to the same "subject matter." This section of the Uniform Sales Act means that an express warranty as to one particular factor or element does not negative an implied warranty as to a different element or factor. For instance, an express warranty as to color, quantity, dimensions or weight does not exclude an implied warranty if one exists, as to quality or fitness.

Where the buyer relies on an express warranty of quality or merchantability, he cannot recover on an implied warranty thereon. The alleged existence of an express warranty as to merchantability or quality in favor of the buyer is predicated on his lack of knowledge as to the goods and his conscious or deliberate *refusal* to buy the goods unless the seller expressly warrants their quality or merchantability, so that the buyer actually and intentionally buys the goods in reliance on the express warranty. An implied warranty as to quality or merchantability of goods is not based on any actual deliberate or intentional express statement as to the goods by the seller, so that there is no actual or deliberate reliance by the buyer on any statement by the seller. An express warranty as to merchantability or quality of goods is therefore inconsistent with an implied warranty as to merchantability or quality of the same goods.

In the instant suit, since the petitioner was told that the respondents did not handle or have the goods and the petitioner did not rely on the skill, choice or selection of the goods by the respondents, under the uniform and settled authorities on this point, there could not be any implied warranty of any kind in the transaction in the suit at bar, even if the petitioner had alleged the existence of an implied warrant in its complaint.

The sale for 750 cases of Tequila described as "Mariachi Gold". "Gold" referred to the yellow color of the beverage. Both parties tried the case in the trial court with the understanding that Illinois law would govern the transaction (Rec. 127, 128, 130, 132, 169, 171).

At pages 39-40 of respondents' original brief in opposition to petition for certiorari, we pointed out that the courts of review of Illinois have consistently followed

the rule that under Section 15(4) of the Illinois Uniform Sales Act, where a sale of goods is made under a particular trade name, there is an implied warranty to deliver the identical article sold, but there is no implied warranty of merchantability. It, therefore, appears that the petitioner could not recover in this case on either an express or implied warranty as to quality.

Under the uniform Illinois decisions, regardless of the decisions of other states, the petitioner could not recover against the respondents in this case on any implied warranty.

If we assume, without conceding, that the respondents were not agents, but the principals in the transaction, it was incumbent upon the petitioner to prove that the respondents were dealers in the goods before the petitioner could recover on any implied warranty under Section 15 (2) of the Uniform Sales Act of Illinois even if plaintiff's complaint had relied on an implied warranty.

The Circuit Court of Appeals properly pointed out that alleged proof of dealership in the Todes deposition was excluded from the record by the petitioner.

However, if we are still bound by our original concession in our brief in opposition to *certiorari*, that a portion of the Todes deposition might be considered as having been introduced in the record, we believe it is only fair to construe this portion with the entire deposition of Todes, so that this concession can be properly evaluated in the light of his complete deposition. Todes was a mere salesman for the respondents, whose authority was limited to soliciting orders for goods and sending the orders to the respondents, who in turn would send the orders to Mexico for confirmation and acceptance by the Mexican shipper (Rec. 22).

When Todes was employed as a salesman, he was told by the respondents that they were not in the liquor business nor did they see or handle the goods, and that all orders accepted by the Mexican shipper would be shipped directly to the buyer by the shipper in Mexico (Rec. 22). Todes in his deposition stated that when he obtained the initial order for the goods from Mr. Lazarus, Todes told Lazarus that they, the respondents, were not in the liquor business, knew nothing about the liquor business, and "they are not responsible for the shipments or the quality of the merchandise or anything about it" (Rec. 26). Thereupon, Lazarus ordered the goods.

Todes' deposition also states that he told Lazarus that the respondents "had nothing to do with the liquor business; they were not in the liquor business, and that they could not have an importer's license or any other kind of license as they were not in the liquor business, and that all orders Todes obtained, including the Globe order, were "subject to acceptance and confirmation by the shipper in Mexico" (Rec. 28).

After the shipment arrived in this country and was examined by the Food and Drug Agency, Todes' deposition states that Todes talked to Lazarus and Lazarus said "I agree that the shipper is responsible for it. • • • I am not saying that it is your fault, but it is the shipper's fault" (Rec. 32).

At page 27 of its additional brief, under footnote 19, the petitioner quotes a portion of the Todes deposition that was excluded as evidence in the absence of the jury (Rec. 160). This excluded portion quoted Todes as stating that after he told Mr. Lazarus that the respondents would not be responsible for the shipment of the merchandise or its quality, Lazarus had no comment. However, the order was given *after* Todes told Lazarus of the respondents' refusal to warrant the goods.

A disclaimer of warranty or refusal of warranty oftentimes is expressed on a label or other legend on the goods, and numerous cases have held that where buyers buy goods under these conditions the transaction is one where the seller has refused to warrant the quality of the goods. Lazarus admitted that he gave the initial order with the understanding that the respondents were not to be liable for the quality, because of his later admission to Todes "I agree that the shipper is responsible. * * * I am not saying that it is your fault, but it is the shipper's fault" (Rec. 32).

The respondents in the trial court made an offer of proof that their net commission in the transaction was $342.16 (Tr. 166). The trial court entered judgment against the respondents for $9,717.68.

Now, all of these portions of the Todes deposition that we have discussed under this section of our brief were without question excluded from the record during the trial of the case and we were compelled to discuss them because of the incorrect statements in the petitioner's briefs that certain portions of the Todes deposition were properly introduced in the record.

If the *entire* deposition of Todes had been properly introduced in evidence, the result in the instant suit would have to be the same that was reached by the Circuit Court of Appeals. The petitioner would still have relied on an express warranty without having proved it, and the uncontradicted Todes deposition would have proved that Lazarus gave Todes the initial order after Lazarus was clearly and definitely told by Todes that the respondents refused to warrant the quality of the goods or the shipments. The admission of Lazarus just quoted would have established that it was the petitioner's understanding that the respondents refused to

warrant the goods (Rec. 32). The Lazarus admission shows the construction the parties themselves placed upon their transaction. "No extrinsic aid can be more valuable," (*Slack* v. *Knox*, 213 Ill. 190, 194).

Even if it is assumed, without conceding, that there was properly introduced in the record only those portions of the Todes deposition upon which the petitioner relies in its briefs in this court, the petitioner still would have failed to prove an iota of proof in support of its allegation in its complaint as to the existence of an alleged express warranty. Consequently, the decision of the Circuit Court of Appeals in the case at bar would have been the same.

If it is assumed that the petitioner would have alleged in its complaint the existence of an alleged implied warranty of quality, then it would have been incumbent upon the petitioner to prove that the respondents were dealers, that is to say, principals who dealt in the goods. In that event, the uncontradicted entire Todes deposition would have proved that every order that Todes obtained was subject to confirmation by the shipper in Mexico, who made direct shipment from Mexico to the buyer in this country, and that the respondents acted as mere agents for the shipper in all these transactions.

The undisputed evidence properly admitted in the record in this case, and the undisputed evidence in the Todes deposition that was excluded by petitioner, establish conclusively that the respondents were only the agents of the shipper in Mexico, who could arbitrarily accept or reject any orders obtained by the respondents that were sent to him by his agents, the respondents.

A "dealer" has been construed to mean a shipper or a principal, and not an agent or a salesman. In *Cosner*

v. *Hancock*, 149 S. W. (2d) 239, it was held that a salesman was not considered as a "dealer".

In *Lovering* v. *Duplex Power Car Company*, 204 Mich. 658, 171 N. W. 374, the Michigan Supreme Court held that the provisions of the Michigan Securities Act applicable to a "dealer" did not apply to an agent.

Even if the plaintiff's complaint referred to an implied warranty and if it would be assumed, without conceding, that in the case at bar, the sale was made without being subject to acceptance and confirmation by the shipper, this would have constituted an isolated case as the record is barren of any other sales by the respondents. Moreover, if the other sales described by Todes in his extended deposition could be considered, all these sales were made by the respondents as agents as all these sales were subject to confirmation and acceptance by the shipper. It has been held that when a person makes an isolated sale, that sale does not constitute the dealer as the seller of the goods (*Overall* v. *Bezeau*, 37 Mich. 506, 507).

Inasmuch as the petitioner's point of an alleged implied warranty was not made in the trial court, and was not raised until the case was argued on appeal, and since the petitioner itself saw fit to exclude the entire deposition of Todes from the record in the case, there was no proof in the record that the respondents were dealers in the goods, which is a prerequisite to any recovery on an implied warranty under Section 15 (2) of the Uniform Sales Act of Illinois, assuming that petitioner's complaint would have alleged the existence of an implied warranty.

We would like at this point to call the Court's attention to certain facts in the transaction that were properly introduced in evidence. When the petitioner dealt with Todes, the salesman for the respondents, it considered

them as agents or brokers. This was admitted in open court by Morton L. Lazarus, Vice President of the petitioner, when he testified in the case (Rec. 96, 106).

Mr. Lazarus admitted that he was told that the respondents did not have possession of the goods and that it would be shipped directly from Mexico to the petitioner (Rec. 97).

Obviously there was such a great demand for alcoholic beverages at the time Lazarus gave his initial order that he promised Todes a finder's commission of $1.00 a case or $750.00 if the goods could be procured, and this commission was paid by the petitioner to Todes (Rec. 96).

Lazarus also admitted in open court that the petitioner received a telegram from the Mexican shipper offering to filter and recondition the merchandise (Rec. 104).

The trial court excluded evidence in the Todes deposition that about the time the goods arrived in this country, the bottom dropped out of the liquor market and the demand for the goods disappeared. The trial court also excluded the written admission of the petitioner that they refused the offer of the shipper to recondition the goods at his own expense "in view of the present liquor market conditions." (Def. Ex. 14 for identification; Rec. 201.)

The petitioner did not introduce any evidence that the respondents handled any of the money in the transaction, even though the letter of credit was made payable to them or to their assigns. The trial court excluded the respondents' offer of proof that the entire purchase price for the goods, in accordance with the Mexican shipper's invoice, was paid under the letter of credit, and that these monies were transmitted in their entirety to the shipper

in Mexico, who then paid to the respondents their gross commission on the sale (Rec. 165-166).

Even if all of the evidence we have discussed in this section, which was excluded successfully by the petitioner in the trial court, had been properly introduced in evidence, the record would then have still presented undisputed questions of fact, and would have presented the same ultimate questions of law which were the basis of the decision of the Circuit Court of Appeals, namely, the petitioner relied solely on an alleged express warranty of quality and failed to introduce a single syllable of proof in support thereof.

At pages 32 and 33 of our original brief in opposition to the petition for certiorari, we argued the point that in sales of food or beverages from one dealer to another dealer, there is no implied warranty by the seller as to the merchantability or quality of the goods. This is not to be improperly construed by the petitioner as an admission that the respondents were dealers. The proper meaning to be given to this argument is that even if the respondents would have been dealers, there could not have been any implied warranty in a sale from one dealer to another.

The undisputed facts in this case establish beyond all doubt that the respondents were not dealers or sellers or principals, but mere agents in the transaction. The petitioner recognized this agency status of the respondents and dealt with them in that capacity.

We regret that we were compelled to go into a lengthy explanation as to the excluded evidence in the case, but we deemed it necessary to do so in order to correct any possible misconceptions that may have arisen from the references and arguments in the petitioner's briefs as to proof that was excluded by the trial judge on petitioner's own motion.

9.

Petitioner's Duty to Minimize Damages.

Even if it is assumed, without conceding, that the respondents were the principals, the sellers in the transaction and not the agents, and that they sold the goods under an express warranty as to quality, it still would have been the duty of the petitioner to accept the offer of the Mexican shipper to recondition the merchandise (Rec. 104).

There was no time limit specified in the transaction for delivery of the goods, and therefore delivery could have been made within a reasonable time. Had the petitioner accepted the Mexican shipper's offer to recondition the goods, delivery of the goods in good condition could have been made within a reasonable time after the order was accepted by the Mexican shipper.

It is a fundamental rule of law that notwithstanding this supposed breach of contract by the seller, the buyer is under a duty to minimize the seller's damages. (15 Am. Jur., Sections 27, 28 and 30, pages 420-426; 25 C. J. S., Section 33, page 499, Note 51; *Cedar Rapids and Iowa City Railway & Light Co.* v. *Sprague Electric Co.*, 280 Ill. 386.) Petitioner, therefore, was under a duty to accept the Mexican shipper's offer to recondition the goods.

At pages 21 and 22 of our original brief in opposition to the petition for certiorari we quoted a portion of the 1944 Annual Report of the Food and Drug Administration, explaining the prevalence of spoilage in shipments of imported liquor and the common practice of reconditioning the goods under government supervision. Had the petitioner accepted the offer of the Mexican shipper to recondition the goods at his expense, the original trans-

action of sale would have been fully performed and no one would have been damaged.

10.

Parol Evidence Rule Moot in the Instant Suit.

The petitioner was successful in the trial in invoking the Parol Evidence Rule and thereby excluded the entire deposition of Todes which included his direct testimony of the refusal of the respondents to warrant the quality of the goods. Since this evidence was excluded and was not considered by the Circuit Court of Appeals, there is no particular point in arguing the applicability of the Parol Evidence Rule in the suit. This question has became moot. Some points on this topic raised in the petitioner's additional brief call for our brief comment. *Zell* v. *Amerilan Seating Co.*, 138 F. (2d) 641, cited at page 22 of the petitioner's additional brief contains a serious criticism of the parol evidence rule. At page 644 of that decision, the court said:

> "We thus construe the record because we do not share defendant's belief that the rule is so beneficent, so promotive of the administration of justice, and so necessary to business stability, that it should be given the widest possible application. *The truth is that the rule does but little to achieve the ends it supposedly serves.*
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> • • •
>
> "The rule, then, does relatively little to deserve its much advertised virtue of reducing the dangers of successful fraudulent recoveries and defenses brought about through perjury. The rule is too small a hook to catch such a leviathan. *Moreover, if at times it does prevent a person from winning, by lying witnesses, a lawsuit which he should lose, it also, at times, by shutting out the true facts, unjustly aids other persons to win lawsuits they should and would*

lose, were the suppressed evidence known to the courts. Exclusionary rules, which frequently result in injustice, have always been defended. * * *"* (Italics ours.)

The petitioner, at pages 22 and 23 of its additional brief, contends that there was a contract in writing between the parties evidenced by the initial order (Pl. Ex. 1, Rec. 178); a letter from Todes to the petitioner (Pl. Ex. 2, Rec. 179), and a letter from the petitioner to Todes (Pl. Ex. 3, Rec. 179). The initial order was simply an unaccepted offer to buy the goods by the petitioner. Plaintiff's Exhibit 2, being the letter of Todes to the petitioner, was a quotation of the price and stated that the order was being cabled to Mexico. Plaintiff's Exhibit 3 was a confirmation of the quotation. All three of these instruments can only be construed as a continuing unaccepted offer of the petitioner to buy the goods, together with a memorandum of some of the terms of the offer to buy.

The letter of credit clearly indicated that the transaction was to be performed by the Mexican shipper, who would issue his own invoice directly to the buyer, together with the Mexican shipper's original bill of lading and other title and shipping documents.

These orders required acceptance by the Mexican shipper. The order was not accepted until shipment was made by the Mexican shipper directly to the petitioner.

The law is uniform and well settled that unaccepted orders are not within the Parol Evidence Rule. (*McCormick Harvesting Mach. Co.* v. *Richardson*, 56 N. W. 682; *Anderson Bros.* v. *Sioux Monument*, 232 N. W. 689; *Briggs* v. *Hilton*, 3 N. E. 51).

It is also well settled that a letter of credit is not part of the contract between a buyer and seller, but is an entirely separate and independent contract between the bank and the seller. (9 C. J. S. 388; *Jones* v. *Bond*, 217 Pac. 726, 727).

These three documents that the petitioner relies on as representing a written and integrated contract, were incomplete and ambiguous in the following other respects:

(a) Direct shipment from Mexico to Globe was omitted.

(b) The time of shipment from Mexico was omitted.

(c) The manner of shipping the merchandise by means of a railroad carrier was omitted.

(d) The manner, details and time of payment were omitted.

(e) The contents of the letter of credit which specified the production of the Mexican shipper's commercial invoice and bill of lading made to the order of the shipper were ambigious, contradictory and inconsistent with the original order which appeared to be addressed to International Industries.

We believe that it is clear beyond argument that the Circuit Court of Appeals was correct in stating in its original opinion that no written definitive contract was entered between the parties covering the transaction (Rec. 231).

11.

Direct Privity Between the Petitioner and the Mexican Shipper.

In its opinion on the petition for rehearing, the Circuit Court of Appeals indicated that the transaction was

one between the petitioner and the Mexican shipper. The court said in its opinion:

> "Neither can it be contended that the sale was not executed by delivery of the goods conditionally to the plaintiff. The plaintiff agreed to a conditional delivery and to accept such conditional delivery by agreeing to the shipment of the goods C. I. F. Laredo, Texas, on a bill of lading made to the order of the shipper, Gonzalo A. Larrea, and endorsed by the shipper in blank, and the goods to be shipped in bond subject to the right of the United States Customs Officers to inspect and accept or refuse admission of the goods to this country. When the plaintiff, with the letter of credit which it had authorized, took up the bill of lading under such circumstances, the sale was executed, and the title to the goods passed to the plaintiff. In any view of this case the court erred in sustaining the motion of the plaintiff for a directed verdict and also erred in overruling the motion of the defendants for a directed verdict" (Rec. 258, 259).

The contents of the letters of credit furnished by the petitioner to pay for the merchandise established that the petitioner was in direct privity with the Mexican shipper in the transaction. The letters of credit (Pl. Ex. 4; Rec. 180-181) required the production of the following title and shipping documents before payment would be made under the letters of credit: (1) Mexican shipper's commercial invoice; (2) Consular invoice in duplicate; and (3) Original bill of lading issued to order of Mexican shipper, blank endorsed, evidencing shipment of 750 cases of Tequila to Laredo, Texas.

Accordingly, the title and shipping documents were to be sent directly by the Mexican shipper to the petitioner, which proved the direct relationship between the two.

It has been held as a matter of law that "invoices" are written itemized accounts sent to a purchaser by a seller of merchandise. (*Merchants Exchange Co.* v. *Weisman*, 93 N. W. 869, 870; *Southern Express Co.* v. *Hess*; 53 Ala. 19, 22; *State* v. *Standard Oil Co.*, 271 N. W. 185, 187.)

The letters of credit also provided that they could be assigned and that drafts drawn against the letters of credit would be payable at The First National Bank of Chicago. The letters of credit were assigned and payment thereunder was made to The First National Bank of Chicago. Payment under the letters of credit was not made to the respondents, nor did they handle the proceeds representing the payment of the goods.

Under the terms of the letter of credit, everything was left to the Mexican shipper in order to make the transaction operative. The Mexican shipper not only had to ship the goods, but also had to comply with each and every one of the terms named in the letter of credit. The respondents had no discretion or power to control the transaction as the shipment of the goods and any liability under the letter of credit depended upon the consummation of the transaction by the Mexican shipper.

The undisputed facts in the transaction prove that the petitioner dealt with the respondents as the agents of the Mexican shipper, and since the latter shipped the goods directly to the petitioner, there was direct privity and an executed contract between the petitioner and the Mexican shipper.

12.

Globe Ordered Required Acceptance.

Until Globe's initial order was accepted by Larrea, and the latter communicated notice of his acceptance to Globe, Globe could withdraw its order or offer without incurring any liability under the order or letter of credit.

Petitioner's order and request (Pl. Ex. 1, Rec. 178) and the letter of Todes to the petitioner (Pl. Ex. 2, Rec. 179) prove that the petitioner's original order was a mere unilateral offer to purchase goods from a Mexican shipper and required the latter's acceptance. The order required its acceptance by the Mexican shipper before any binding contract would have commenced, and this condition also required the *communication* from the Mexican shipper to the petitioner of the acceptance of the order.

The mere acknowledgment of the reeeipt of the petitioner's order by the respondents was not an acceptance of the order. (*Krohn-Fecheimer Co.* v. *Palmer,* 221 S. W. 353; *Cheboygan Paper Co.* v. *Swigart Paper Co.,* 140 Ill. App. 314; 55 C. J. 107, Notes 9 and 10; *Harvey* v. *Duffey,* 33 Pac. 897.)

The rule requiring acceptance by a seller of a prospective buyer's offer to purchase before a binding contract can be entered into also applies even where the prospective buyer accompanies his order with a deposit of the purchase price in advance, so that before acceptance of the order by the proposed seller, the proposed buyer may withdraw his offer and the proposed seller may return the money, and no binding contract has been made. (46 Am. Jur. 239, Sec. 48, Note 6; *L. A. Becker Co.* v. *Clardy,* 96 Miss. 301, 51 So. 211, Ann. Cases 1912 B 355.)

The only act of acceptance of the petitioner's initial order by Larrea, the Mexican shipper, was by his actual shipment of the goods on May 22, 1944, consigned directly to the petitioner (Def. Ex. 7, Rec. 195). At any time before the goods were shipped, therefore, the petitioner could have withdrawn its offer to purchase without incurring any liability under its initial order or letter of credit.

13.

Disclosure of Shipper's Identity in Apt Time.

Assuming, but not conceding, that it was necessary for San Roman to disclose to Globe that the shipper's name was Larrea, San Roman made this disclosure in apt time.

It will be seen from our discussion under point 15 of brief that Illinois law does not require an agent to disclose the name of his principal in order for the agent to be absolved of personal liability.

The petitioner at pages 24, 25 and 26 of its additional brief has made an issue of the point as to the time of disclosure. It was unnecessary for the petitioner to argue this point as the petitioner was successful in inducing the trial judge to exclude from the evidence Defendants' Exhibits 4 and 5 for identification (Rec. 192-193), which notified the petitioner that the name of the Mexican shipper was Gonzalo A. Larrea, and his address and place of business was also included in this information.

Since the petitioner argued this point, which was based on excluded proof, we deem it necessary to answer it briefly. The name and location of the shipper was furnished to the petitioner *before* its order was accepted by the shipper and *before* the petitioner incurred any liability under the letter of credit.

Before the name and location of Larrea was furnished by the respondents to the petitioner, the petitioner could have withdrawn its unaccepted order and be free of any liability in the transaction including any liability under the letter of credit that it procured.

14.

Letter of Credit, Only When Acted Upon, Is Irrevocable.

A letter of credit is an independent offer of the issuer to purchase shipping documents and the offer does not become a contract until payment thereunder is requested, accompanied by the specified shipping or title documents attached, or the beneficiary performs some other act in reliance on the letter of credit.

The petitioner makes much of the fact that the letter of credit named the respondents as beneficiaries. However, the letter of credit was made assignable and payable at the First National Bank of Chicago, which acted as a clearing house in the transaction.

Unless and until the Mexican shipper would have shipped the merchandise and would have complied with each and every term specified in the letter of credit, it would have no more effect than a blank piece of paper, even though the letter of credit was labeled as being "irrevocable."

We repeat that it is undisputed that none of the money in the transaction was handled by the respondents. Petitioner admitted that it regarded the respondents as the agents in the transaction.

A letter of credit becomes "irrevocable" only when the beneficiary thereunder acts on it.

In 9 C. J. S. Section 176, page 385, Note 86, the following pertinent rule is stated:

> "If the letter shows that it was written for the purpose of being shown in order to obtain credit and the purchaser is within the terms of the letter, it amounts to an *offer* that, if he purchases the draft, it will be honored, and the *offer or promise becomes* a contract when the draft is negotiated." (Italics ours.)

In *Banco National* v. *First National Bank,* 289 Fed. 169, 174, the Court, in commenting on the nature of a letter of credit, held:

> "That offer or promise (letter of credit) became *a contract when* the draft is negotiated." (Italics ours).

This same principle was followed in *Moss* v. *Old Colony Trust Co.,* 140 N. E. 803, and *American National Bank and Trust Co.* v. *Banco,* 166 So. 8.

Applying the principles in the authorities just cited to the case at bar, it follows that there was no liability whatever to any person under the letter of credit until the merchandise was delivered to the carrier by the Mexican shipper on May 22, 1944. The letter of credit required production of the shipping and title documents as a condition to payment thereunder. These could not be produced until shipment was made.

Larrea, the Mexican shipper, did not accept the petitioner's order and the latter's order did not become a binding contract until Larrea shipped the goods on May 22, 1944. Therefore, at any time before the petitioner's order was accepted by the Mexican shipper, that is to say, at any time before the goods were shipped by the latter on May 22, 1944, the petitioner could have withdrawn its order without incurring any liability thereunder and could have requested the bank not to honor

any drafts drawn under the letter of credit as no rights of third parties had intervened.

Even if the petitioner had withdrawn its offer before it was accepted by the Mexican shipper and would have notified its bank not to honor any drafts under the letter of credit, and if the shipper would nevertheless have shipped the goods and demanded payment under the letter of credit, this would have constituted a fraud on the shipper's part and the bank would not have been under any duty to honor any drafts under the letter of credit.

In "Legal Aspects of Commercial Letters of Credit" (Finkelstein) published by the Columbia University Press in 1930, at page 248, the following applicable rule is set forth:

> "Where a bank (issuing a letter of credit) can show that the seller has acted fraudulently, it is under no duty to pay the seller."

(See also *Sztejn* v. *Schroeder*, 31 N. Y. S. (2d) 631).

In *Camp* v. *Corn Exchange Bank*, 132 Atl. 189, the Supreme Court of Pennsylvania held that a bank issuing a letter of credit had the right to heed a request of its customer to stop payment under a letter of credit for a reasonable period.

A letter of credit is a contract having the character of a guaranty. (24 Am. Jur. 888, Note 7, Sec. 20 and cases cited; *Lafargue* v. *Harrison*, 70 Cal. 380, 9 Pac. 259, 11 Pac. 636, 59 Am. Rep. 416).

Had the petitioner withdrawn its order before Larrea accepted it and so notified Larrea, no binding contract would have existed and the letter of credit would not have an obligation to guarantee. If a primary or principal obligation does not exist, there cannot be a contract of guaranty. (24 Am. Jur. 901, Note 3, Sec. 41). "With-

out principal debt, there can be no guaranty." (24 Am. Jur. 875, Notes 15, 16, 17, Sec. 4).

Suppose cash had been paid to the respondents as agent. The transaction then would not have been any different. Under those circumstances, until the Mexican shipper accepted the order, the deposit of the entire proposed purchase price with the respondents would have been under their status as agents. It is not unusual under certain market conditions for a prospective buyer to accompany his order with money in advance for the amount of the proposed purchase as an inducement for the seller to accept the order and ship the goods.

The furnishing by petitioner of a letter of credit was a continuation and part of its initial unaccepted order and can be regarded as "cash with the order," and the order was still subject to acceptance of the shipper. Had the petitioner withdrawn its order before the shipper accepted it and so notified the shipper, no binding contract would have existed under the letter of credit.

15.

Disclosed Agency Status Eliminates Personal Liability.

The petitioner dealt with the respondents knowing of their status as agents for the Mexican shipper. It was stipulated at the trial that Illinois law would govern the transaction. The Illinois authorities hold that an agent, in dealing with a third person, is liable personally only under the following circumstances:

(1) When an agent enters into a written or oral contract in his own name, and fails to disclose or conceals his *status* as an agent;

(2) When an agent enters into a complete and unambiguous *written* contract in his own name as principal and does not disclose his agency status;

(3) When an agent represents a non-existent principal;

(4) When an agent representing a disclosed or undisclosed principal pledges his own credit and expressly agrees to be personally bound by the contract.

The respondents were in none of these classifications.

Annes v. *Carolan, Graham, Hoffman, Inc.*, 366 Ill. 542, cited at page 24 of petitioner's additional brief, is not in point, as it involves an agent who did not have a principal at the time the supposed agent entered into the contract, and the supposed principal later repudiated the authority of his agent.

In *Wheeler* v. *Reed*, 36 Ill. 81, cited at page 24 of petitioner's additional brief, the opinion of the Supreme Court of Illinois points out in that case that the agent dealt *in his own name* as seller and as principal, and did not disclose his status as an agent.

In *Scaling* v. *Knollin*, 94 Ill. App. 443, cited at page 24 of petitioner's additional brief, a commission firm failed to disclose the fact that it was acting in an agency status and executed a bill of sale in its own name, and had possession of the goods in question. In *Trench* v. *Hardin County Canning Co.*, 67 Ill. App. 269, also cited at page 24 of petitioner's additional brief, a party entered into a contract in its own name and throughout the negotiations held itself out as principal and mentioned nothing about its status as agent. In *American Appraisal Co.* v. *Pio*, 246 Ill. App. 467, also cited at page 24 of petitioner's additional brief, that decision points out that an attorney con-

tracted for services as a principal, personally made payments on account from time to time, received bills from the seller from time to time without objecting thereto, and he did not disclose his alleged status as an agent.

In *Chicago Title & Trust Co.* v. *De Lasaux*, 336 Ill. 522, 526, the Illinois Supreme Court said:

> "Where an agent in making a contract discloses his agency and the name of his principal, *or* where the party dealing with the agent knows that the agent is acting as an agent in making the contract, the agent is not liable on the contract unless he agrees to become personally liable. (*Millikin* v. *Jones*, 77 Ill. 372; *Wheeler* v. *Reed*, 36 id. 81; *Chase* v. *Debolt*, 2 Gilm, 371)." (Italics ours).

As early as 1945, the Illinois Supreme Court decided this last cited case of *Chase* v. *Debolt*, 7 Ill. (2 Gilm.) 371. An agent named Chase, who was actually the agent of a bishop, also named Chase, hired one Debolt to perform work and labor and at the time he was orally employed by the agent, Chase, the latter did not tell Debolt that he, Chase, the agent, was acting for the bishop. As Debolt was performing his work, he learned the fact that the agent actually was representing the bishop when Debolt was hired. In a suit by Debolt against Chase (the agent), the latter was held not liable for the work and material furnished by Debolt. At page 375 of this opinion, the Supreme Court of Illinois said:

> "Agents may become liable for contracts made for their principals, where they conceal or do not disclose their character or agent, and it is unknown to the party with whom they contract, and they may also by the nature and character of the contract entered into. But it is quite immaterial whether the agent discloses *his character or his principal*, himself, if it be actually known at the time to the other party. In such case the agent will *not* be bound, *unless he*

enter into such a contract as will bind him at all events." (Italics ours).

It is significant that this *Chase* v. *Debolt case,* 7 Ill. (2 Gilm.) 371, has not been overruled or modified in any respect and was cited and followed by the Illinois Supreme Court as late as 1929 in the previously cited case of *Chicago Title & Trust Co.* v. *De Lasaux,* 336 Ill. 522, This *Chase* v. *Debolt* case is also important because it establishes a fundamental principle of agency if a third person deals with an agent knowing his status as an agent, whether the agent does or does not disclose the name of his principal, the agent is not liable, personally, *unless the agent expressly agrees to be bound personally.*

The fallacious contention is often made, and probably will be made by the petitioner in its reply brief, that an agent who discloses his status as an agent but acts for an unnamed or undisclosed principal is personally liable in the transaction. That is not the law in Illinois. The authorities cited in this section of our brief include authorities that go back as far as 1845. All of them enunciate the basic principle that a third person who deals with an agent *as an agent* for a disclosed or undisclosed principal cannot hold the agent liable personally, *unless the agent expressly agrees to be bound personally, or unless the agent has entered into a complete unambiguous written contract in his own name as principal.*

This basic rule of the non-liability of an agent who discloses his *status as an agent* has also been followed by courts of other jurisdictions. A case in point is one decided by the Supreme Court of Texas, *Johnson* v. *Armstrong,* 83 Texas 325; 18 S. W. 594; 29 Am. St. Rep. 648. This concept of agency in *Chase* v. *Debolt,* 7 Ill.

(Gilm.) 371, was recognized by Tiffany on Principal and Agent (1903 Ed.), where at page 363 that author, in commenting on an undisclosed or unnamed principal states:

> "By failing to disclose (the agency) he (the agent) assumes the risk of being bound; *but if the other party actually knows*, although from some other source, that the agent is contracting as such, and *he does not expressly bind himself*, the principal only is bound." (Italics ours).

This same rule of agency was also recognized in Anson on Contracts (1906 Ed.), where, at page 428 (note 1), of that authority, it is stated:

> "An agent who contracts for an *unnamed* principal *as agent* will *not be liable personally.*" (Italics ours).

In *Warren* v. *Dickson*, 27 Ill. 115, the Suprem Court of Illinois followed this same principle of agency. At page 118 of that opinion, the Court said:

> "This instruction was clearly wrong, for the plaintiffs may have known perfectly well, that the defendant was getting the lumber for another, and not on his own account. In such a case, it surely was not necessary for the defendant to disclose his agency. If the plaintiffs knew that fact, why disclose it, on receiving the lumber? The instruction shuts out of view this consideration."

In *Millikin* v. *Jones*, 77 Ill. 372, at page 375 of that opinion, the Court held that the following instruction as corrected by the trial court correctly stated the law as to the personal liability of an agent. At page 375 of this opinion, the Court stated:

> "The Court further instructs, for the defendant, that, if it appears, from the evidence, that, in hiring the pasture, Millikin acted as the agent of Frank Calhoun, then, *it is immaterial whether the defendant disclosed his character* or his principal, if they

believe, from the evidence, that plaintiff, Jones, knew, at the time, that Millikin was acting in such character as agent.

"To which the court added:

"Unless the jury believe, from the evidence, that notwithstanding Millikin was acting as the agent of Calhoun, he, also, by his alleged agreement, *bound himself to become responsible for said pasturage, or some portion of it.*" (Italics ours).

In *Savage* v. *Stewart,* 226 Ill. App. 388, the Court passed on the personal liability of an agent in a transaction. At page 393 of that opinion, the Court said:

"An agent is not liable on a contract made on behalf of his principal if, in fact, the other party knew of the agency (*Warren* v. *Dickson,* 27 Ill. 115; *Marckle* v. *Haskins,* 27 Ill. 382; *Siegel* v. *People,* 106 Ill. 89), and it is only where the agent contracts as principal and does not disclose that he is acting as agent that the agent becomes personally liable as principal. *Weil* v. *Defenbaugh,* 65 Ill. App. 489; *Trench* v. *Harding County Canning Co.,* 67 Ill. App. 269; *Leohde* v. *Halsey,* 88 Ill. App. 452; *Geiselman* v. *Roddinghaus,* 158 Ill. App. 316. Under the evidence appellee was not liable on this contract as principal."

Hypes v. *Griffin,* 89 Ill. 134, cited at page 23 of the petitioner's brief is not applicable to the suit at bar, because the note in question there was a complete written and unambiguous contract in writing that could not be modified by parol evidence. The note in that case did not contain the promise of the Methodist Episcopal Church of Lebanon to pay the note, but in the body as well as the signature of the note, the persons who happened to be the trustees of the church, *promised individually* to pay the note.

The authorities cited in this section of our brief establish the well-settled rule of law in Illinois that if a

third person deals with an agent who discloses his status as an agent, the agent is not bound personally, even if he fails to disclose the identity of his principal, *unless the agent expressly agrees to be bound personally.* In the suit at bar, there was a total failure of the petitioner's proof on this point.

It is definitely settled under the Illinois cases that the respondents could not be liable in this transaction because of their agency status, *in the absence of proof that they agreed to be personally liable. No such proof exists.*

This agency point is collateral to the main and decisive question in the case, namely, even if the respondents had been principals, that is to say, sellers in the transaction, the decision of the Circuit Court of Appeals was proper, because the petitioner failed to prove the existence of an express warranty of quality, upon which its entire claim rested.

16.

The Decision of the Circuit Court of Appeals Was Just and Fair.

Had the petitioner accepted the offer of the Mexican shipper to recondition the goods at his own expense, the original contract would have been fully performed and no one would have been damaged.

The petitioner dealt with the respondents and recognized them as being agents or brokers. The trial court commented on Lazarus' testimony that he, Lazarus, referred several times to the broker status of the respondents (Rec. 106). Lazarus admitted receiving a telegram from the Mexican shipper whereby the latter agreed to filter and re-bottle the merchandise at his own expense (Rec. 104). The petitioner was so anxious to procure the merchandise that it *paid* Todes a separate finder's com-

mission (Rec. 96). Had the petitioner accepted the offer of the Mexican shipper to recondition the goods at his own expense, the contract would have been fully performed and no one would have been damaged. During the period in question foreign importations of liquor were frequently found to be defective and thousands of cases were reconditioned under United States Government supervision and released to the public.

17.

CONCLUSION.

The petitioner admits that the record does not contain any conflicting evidence. No complaint has been made by the petitioner that there was any erroneous or improper evidence admitted in the record in behalf of the respondents. None of the evidence introduced by the petitioner in the trial court was improper so that any part of it requires correction or supplanting.

The petitioner had ample opportunity to prove the existence of the basis for its claim, namely, that an express warranty of quality existed in the transaction.

The entire claim of the petitioner was based solely on an express warranty. It was therefore too late for the petitioner to rely on an alleged implied warranty for the first time after the case was argued in the Circuit Court of Appeals. The Circuit Court of Appeals held correctly that not an iota of proof in support of this alleged express warranty was offered in evidence so that it became immaterial whether the respondents were principals or agents. The Circuit Court of Appeals also held correctly that the undisputed facts in the transaction show that there was direct privity beween the petitioner and the Mexican shipper, and that the peti-

tioner dealt with the respondents as the agents of the Mexican shipper.

The petitioner itself excluded from the record the Todes deposition, which the petitioner now asserts proves that the respondents were dealers. Even this contention is incorrect, because the entire deposition of Todes proves the contrary, namely, that the respondents were only the agents of the Mexican shipper, and that every order received by the respondents would in turn be sent to the Mexican shipper for his acceptance and confirmation.

It is undisputed that the respondents did not have possession of the goods, see the goods, handle them, or have anything to do with the goods, and that all shipments were made directly from the shipper in Mexico to the buyers in this country.

Under the settled decisions of Illinois there is no implied warranty of merchantability of goods sold under a trade name. Moreover the alleged existence of an express warranty excludes any implied warranty as to the same factors. The petitioner was so anxious to get the merchandise that it paid Todes a finder's commission of $750.00 in its anxiety to have its order accepted by the Mexican shipper.

In view of the Mexican shipper's offer to recondition the goods, it would be manifestly unfair and grossly unjust to saddle a liability of approximately $10,000 on the respondents who did not see, handle or have anything to do with the goods.

The repeated defense of the respondents that they refused to warrant the goods because of their agency status, was consistently called to the atention of the trial court and the petitioner. Until the petitioner would prove the alleged express warranty, the respondents were

under no duty to prove their defense that they refused to warrant the goods.

The grounds of the respondents' motion for a directed verdict, in view of their oral arguments in support of the motion, and their previous arguments in the case, were a sufficient compliance with Rule 50 (a) of the Federal Rules of Civil Procedure that grounds for a motion for a directed verdict should be specific.

Inasmuch as only questions of law were involved on the undisputed facts in the record in this case, the respondents' motion for a directed verdict should have been allowed by the trial court. Since the trial court, instead, peremptorily allowed the petitioner's motion for a directed verdict and a judgment thereon, it was unnecessary under Rule 50 (b) of the Federal Rules of Civil Procedure for the respondents to have filed a motion for judgment notwithstanding the verdict in the trial court.

Even if Rule 50 (b) applied to the instant suit, it was fully complied with when the respondents filed their detailed motion for a new trial which, in accordance with the reasoning in the *Cone* case, afforded the trial court the same last chance to correct his errors as he would have had if the respondents had filed a motion for judgment notwithstanding the verdict.

Inasmuch as questions of law only were involved on undisputed facts in the record, and since the result by the Circuit Court of Appeals was not only correct, but just and equitable, and since it is clear that the Circuit Court of Appeals had full power to make a final disposition of the case, we believe that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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